[Cite as *State v. Pullen*, 2015-Ohio-552.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 25829
	:	
v.	:	Trial Court Case No. 13-CR-933
	:	
TERRY T. PULLEN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 13th day of February, 2015.

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HALL, J.

{¶ 1} Terry T. Pullen appeals from his conviction and sentence on one count of robbery in violation of R.C. 2911.02(A)(2).

{¶ 2} Pullen advances two assignments of error. First, he contends the trial court erred in denying his Crim.R. 29 motion for judgment of acquittal. Second, he claims the trial court erred in failing to give a jury instruction on the lesser-included offense of theft.

{¶ 3} The present appeal stems from an incident involving Pullen and the victim, Icy Hopkins, on the evening of March 22, 2013. At trial, Hopkins testified that she and Pullen had been drinking alcohol together at her house. They then left in her car seeking drugs to buy. (Tr. at 59-61). While Pullen drove around for about two hours, they stopped and picked up three other people: a woman named "Spice," Spice's boyfriend, and "another girl." (*Id*. at 61-62). At some point, Hopkins became "aggravated" because the driving was using all of the gasoline in her car. (*Id*.). She became particularly upset when they pulled into a gas station and Spice contributed only $5.00 for gas. (*Id*. at 63). After purchasing fuel, Hopkins drove the group away from the gas station. As she did so, she continued complaining about gas money. Her attitude upset Pullen, who punched her once in the eye with a closed fist. (*Id*. at 64-65). Hopkins then proceeded to drop off Spice and her two companions. (*Id*. at 65-66).

{¶ 4} Hopkins became scared as she continued driving with just Pullen in the car. (*Id*. at 66). She was scared because he already had hit her once. (*Id*.). As she approached the People's Market on Main Street, she saw two men she recognized, "Keenan" and a

man she called “New York.” (*Id*. at 66). She stopped the car outside the People’s Market and asked the two men for help, explaining that Pullen had hit her. (*Id*. at 67). Pullen responded by walking away with Hopkins’ car keys, leaving her there with Keenan and New York. (*Id*. at 68). He returned thirty to forty minutes later and ordered Hopkins to drive him somewhere else alone. (*Id*. at 68-69). Hopkins complied with the demand and departed with Pullen in the passenger seat. (*Id*. at 70). At that point, she was “definitely scared to be alone with him.” (*Id*.). She tried to call her mother to ask for help while driving, but it was difficult to do without alerting Pullen. (*Id*. at 70-72). Ultimately, Hopkins decided to drive to Donatos restaurant on Main Street because she previously had worked there and was trying to get help. (*Id*. at 73-74). She pretended to be lost, however, because Pullen was becoming agitated as he wanted her to take him to a location on Cherry Street. (*Id*. at 74). Hopkins testified that as she pulled up to Donatos, Pullen initiated an altercation with her. She described it as follows:

> * * * At that point there was some altercations. He come at me and this is where I’m kind of like everything happened so quick. I don’t know if I was trying to get out of the car or if he was trying to push me out of the car.
>
> I’m still attached to the seat belt. I’m still on the phone with my mom. I had my phone behind my back. I’m half hanging in the car and half hanging out. My feet were hitting the horn. I do know he was trying to get me to stop blowing the horn. He was trying to get the phone from out from behind my back and this whole time I’m, like, screaming.
>
> And then at some point, one of the co-worker’s husbands had pulled up and seen what was going on and he started to approach the car and

that's when Mr. Pullen got the keys from my car and took off.

(*Id*. at 76-77).

{¶ 5} Upon further questioning, Hopkins testified that Pullen was on top of her, grabbing her and pushing her. (*Id*. at 77). She thought he struck her during the incident, but she was unsure because "things were happening so fast[.]" (*Id*. at 78). She specifically remembered him trying to get her phone from behind her back and trying to get her feet off of the horn. (*Id*.). During the incident, the driver-side car door opened and Hopkins was "half in and half out" of the vehicle, still trying to hold her phone. (*Id*. at 78-79). Her car also rolled from the edge of Donatos' parking lot into the middle of Main Street across the lanes of traffic. (*Id*. at 79-80). She testified that she believed Pullen was trying to cause her physical harm. (*Id*. at 79). She identified pictures of scratch marks, cuts, and scrapes on her body that were not present before the incident. (*Id*. at 83-84). She stated that she received these injuries during the altercation but was not sure exactly how. (*Id*. at 108). She also testified that she was scared and urinated on herself during the incident at Donatos. (*Id*. at 85). After her car rolled into Main Street, Pullen took Hopkins' keys without her permission and walked away. (*Id*. at 80-81, 109).

{¶ 6} A second witness, Brian Swanton, testified that he had driven to Donatos to pick up his wife from work. (*Id*. at 33-34). When he arrived, he saw Hopkins' car on the "apron" or edge of the parking lot, partially blocking one of three entrances to Donatos. (*Id*. at 34-35). He pulled into the parking lot and watched her car. (*Id*. at 35-36). As he did so, he heard "horns go off" and saw her car start rolling backward into the middle of the street, blocking traffic both ways. (*Id*. at 37). He then saw the driver-side door open and a cell phone fall out before a man, later identified as Pullen, crawled out of the car and

started walking away. (*Id*. at 38). Swanton testified that the driver of the car he saw was Hopkins, who he knew as one of his wife's friends. (*Id*. at 42). On cross examination, Swanton testified that he could not see any fighting, yelling, or kicking occurring inside Hopkins' car. (*Id*. at 49-50). He did testify, however, that Hopkins was "crying," "hysterical," and "distraught." (*Id*. at 43).

{¶ 7} Dayton police officer Joseph Heyob also testified for the State. He responded to Donatos on the evening in question. (*Id*. at 113). Upon arriving, he saw Hopkins crying while talking on her cell phone. (*Id*. at 114). He also noticed "obvious facial injuries." (*Id*. at 116). Hopkins reported to Heyob that she had been assaulted and that "the guy took her keys and ran westbound." (*Id*. at 117). She later specifically identified Pullen as the person who "had attempted to push her out of the vehicle and had then took her keys." (*Id*. at 121). Pullen was apprehended a few hours later and arrested. (*Id*. at 123-124). He had Hopkins' car keys in his possession. (*Id*. at 124-125). Dayton police officer Amy Simpson testified about apprehending Pullen a few blocks from Donatos on the morning after the incident. (*Id*. at 137-138). She mentioned finding car keys in his pockets. (*Id*. at 139).

{¶ 8} Following the State's evidence, Pullen made an oral Crim.R. 29 motion for judgment of acquittal. The trial court overruled the motion. (*Id*. at 143-144). Pullen then declined to testify and presented no evidence. After the case was submitted to the jury, the trial court received a question about "a lesser charge." The jury's question in its entirety read: "Could we go for a lesser charge?" (*Id*. at 198). The trial court conferred with counsel for both parties, who agreed on the jury being advised that it was confined to the charge of robbery. The trial court so advised the jury. (*Id*. at 198-199). Thereafter, the jury returned a guilty verdict. (*Id*. at 199). The trial court imposed a four-year prison sentence

based, in part, on the fact that Pullen had "about 13 [prior] convictions." (*Id.* at 205). The trial court also imposed additional prison time because Pullen had committed the present offense while on post-release control. (*Id*. at 205-206). This appeal followed.

{¶ 9} Pullen's first assignment of error challenges the trial court's denial of his Crim.R. 29 motion for judgment of acquittal. He asserts that the evidence is legally insufficient to sustain his robbery conviction. In the body of his brief, he also maintains that his conviction is against the manifest weight of the evidence.

{¶ 10} Pullen's argument in support of his legal-sufficiency and manifest-weight challenges is the same. He contends the evidence does not support a finding that Hopkins was injured in connection with the theft of her car keys. He claims she sustained an injury to her face earlier in the evening when he punched her. With regard to the injuries to her back, he asserts that "they were of uncertain origin and she could not testify that they occurred at Donatos." (Appellant's brief at 11). He also notes that the only independent eyewitness, Brian Swanton, did not see or hear any evidence of a struggle or any plea for help. But even if a struggle did occur, Pullen claims "there was no testimony about causing or attempting to cause physical harm when the keys were removed from the car's ignition or otherwise at Donatos." (*Id*.) Instead, he argues that "[t]he source of the injuries [was] clearly from some other place and some other time." (*Id*.).

{¶ 11} When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on an element of the offense to sustain the verdict as a matter of law. *State v. Hawn*, 138 Ohio App.3d 449, 471, 741 N.E.2d 594 (2d

Dist.2000). “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 12} Our analysis is different when reviewing a manifest-weight argument. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A judgment should be reversed as being against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 13} With the foregoing standards in mind, we conclude that Pullen’s conviction is supported by legally sufficient evidence and is not against the manifest weight of the evidence. Pullen was convicted of violating R.C. 2911.02(A)(2), which provides in relevant part: “No person, in attempting or committing a theft offense * * * shall do any of the following: * * * Inflict, attempt to inflict, or threaten to inflict physical harm on another[.]”

{¶ 14} The evidence presented at trial supports a finding that Pullen committed a

theft offense by stealing Hopkins' car keys. The jury reasonably could have found that he obtained control over her property, the keys, with the purpose to deprive her of such property and that he did so without her consent. This conduct satisfies the definition of a "theft offense" under the robbery statute. *See* R.C. 2911.02(C)(2) (applying the definition in R.C. 2913.01(K)(1), which includes a violation of R.C. 2913.02). Alternatively, the jury could have found that Pullen attempted to commit a theft offense when, during the altercation in the car, he repeatedly tried to take Hopkins' cell phone. We note that the State argued both the commission of a theft offense (the keys) and an attempt to commit a theft offense (the cell phone) at trial. (Tr. at 167-168).

{¶ 15} In any event, Pullen's argument on appeal focuses on a different issue, namely whether he inflicted, attempted to inflict, or threatened to inflict physical harm on Hopkins in the course of taking her keys. For purposes of the robbery statute, "physical harm" means "'any injury, illness, or other physiological impairment, regardless of its gravity or duration.'" *State v. Elsberry*, 12th Dist. Butler No. CA2011-12-221, 2013-Ohio-1378, ¶ 21, quoting R.C. 2901.01(A)(3). Although the injury to Hopkins' face as a result of being punched clearly qualifies as physical harm, we agree with Pullen that he did not inflict that particular harm while attempting or committing a theft offense. Hopkins testified that he punched her in the face earlier in the evening when she was complaining about gas money.

{¶ 16} We are unpersuaded, however, by Pullen's argument that the record lacks evidence of any physical harm to Hopkins at Donatos when he took her keys and attempted to take her cell phone. Hopkins testified that Pullen was on top of her, grabbing her and pushing her during the incident. (Tr. at 77). She also testified that she thought

Pullen struck her, but she was unsure. (*Id*. at 78). Regardless, Hopkins identified pictures of scratch marks, cuts, and scrapes on her body that were not present before the incident at Donatos. (*Id*. at 83-84). She testified that she received these injuries during the altercation there. (*Id*. at 108). Although Hopkins could not say exactly how she sustained these injuries, the jury certainly could have concluded that Pullen, who was on top of her trying to take her cell phone, had inflicted them.

{¶ 17} As for Pullen's point that eyewitness Swanton did not see or hear any evidence of a struggle or any plea for help, that testimony did not compel a verdict in his favor. Notably, Swanton was not in the car with Pullen and Hopkins. We note too that Swanton did observe Hopkins "crying," "hysterical," and "distraught" immediately after the incident in her car. (*Id*. at 43). In light of her emotional condition and the scratches and scrapes on her body, the jury acted well within its discretion as the trier of fact in concluding that Pullen had caused her physical harm, which, as noted above, includes any injury regardless of its gravity or duration.

{¶ 18} Viewing the evidence in a light most favorable to the prosecution, we believe a rational trier of fact could have found the essential elements of robbery proven beyond a reasonable doubt. We also do not believe that in resolving conflicts in the evidence the jury clearly lost its way and created a manifest miscarriage of justice. There were few, if any, material conflicts in the evidence, and this is not an exceptional case in which the evidence weighs heavily against Pullen's conviction. Accordingly, the first assignment of error is overruled.

{¶ 19} In his second assignment of error, Pullen challenges the trial court's failure to instruct the jury on the lesser-included offense of misdemeanor theft. Alternatively, he

argues that the trial court should have provided an instruction on robbery by force in violation of R.C. 2911.02(A)(3), a third-degree felony, in addition to the indicted charge of physical-harm robbery in violation of R.C. 2911.02(A)(2), a second-degree felony.[1]

{¶ 20} As a preliminary matter, we note that Pullen has waived all but plain-error review in connection with the trial court's failure to give the foregoing instructions because he neither requested them nor objected to their absence. Notice of plain error should be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Thompson*, Slip Opinion No. 2014-Ohio-4751, ¶ 73, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 21} "The question of whether a particular offense should be submitted to the finder of fact as a lesser included offense involves a two-tiered analysis." (Citation omitted) *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 6. "The first tier, also called the 'statutory-elements step,' is a purely legal question, wherein we determine whether one offense is generally a lesser included offense of the charged offense." *Id*., citing *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). "The second tier looks to the evidence in a particular case and determines whether '"a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense."'" *Id*., quoting *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 13. "[A] charge on the lesser offense is required

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[1] "The difference between the two subsections is that under R.C. 2911.02(A)(2), appellant must have either threatened to inflict, attempted to inflict, or actually inflicted physical harm on the victim, whereas, under R.C. 2911.02(A)(3), appellant must only have used or threatened the immediate use of force against the victim." *State v. Jones*, 193 Ohio App. 3d 400, 2011-Ohio-1717, 952 N.E.2d 513, ¶ 9 (12th Dist.).

'only where the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction upon the lesser included offense.'" *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 192, quoting *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph two of the syllabus. Where the evidence meets this requirement, a trial court has an obligation to give a lesser-included-offense instruction, even over the objection of a defendant who wishes to pursue an "all or nothing" defense. *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207.

{¶ 22} Upon review, we find that Pullen would not have been entitled to a jury instruction on theft even if he had requested one. We recognize that theft is a lesser-included offense of robbery. *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, paragraph two of the syllabus. But the evidence presented at trial would not support a theft conviction and an acquittal on the indicted charge of physical-harm robbery. A conviction for theft (or attempted theft) and an acquittal on the indicted charge would have required the jury to find that Pullen deprived Hopkins of her car keys (or attempted to deprive her of her cell phone) without her consent but also without inflicting or attempting to inflict any physical harm. Here Hopkins provided uncontroverted testimony, corroborated with photographs, depicting some physical harm she suffered in connection with Pullen taking her car keys and attempting to take her cell phone. Based on that evidence, we do not believe the jury reasonably could have found that Pullen committed (or attempted) a theft offense without inflicting any physical harm.

{¶ 23} We reach the same conclusion with regard to an instruction on robbery by force in violation of R.C. 2911.02(A)(3), which is an inferior-degree offense of

physical-harm robbery in violation of R.C. 2911.02(A)(2), the indicted charge. The difference between the charges is that an (A)(3) violation involves the use or threatened immediate use of force in connection with a theft or attempted theft while an (A)(2) violation involves the infliction, attempted infliction, or threatened infliction of physical harm. Here the State presented evidence that Pullen actually inflicted some physical harm on Hopkins when he took her keys and attempted to take her cell phone. We do not doubt that this infliction of physical harm involved the use of force. But we see no reasonable view of the evidence under which Pullen could have been convicted of robbery by use of force and acquitted of robbery by inflicting physical harm. Indeed, his use of force in this case caused the physical harm.

{¶ 24} In light of Hopkins' essentially uncontroverted testimony about what happened inside of her car at Donatos, we certainly see no significant likelihood that the jury---even if it had been instructed on theft or robbery by use of force---would have found Pullen not guilty of physical-harm robbery but guilty of one of the two lesser offenses. Moreover, in conducting plain-error review to prevent a miscarriage of justice, we may take into consideration "a criminal defendant's strategic decision not to seek an instruction on a lesser-included offense[.]" *State v. Coots*, 2015-Ohio-126, __ N.E.3d __, ¶ 87 (2d Dist.) (Fain, J., concurring in judgment).[2] Here defense counsel did not request

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[2] Consistent with the Ohio Supreme Court's recent opinion in *Wine*, supra, the concurring judge in *Coots* recognized that a trial court has a duty to give a lesser-included-offense instruction, where warranted by the evidence, even over a defendant's objection. *Coots* at ¶ 87, fn.3 Thus, we are not suggesting that defense counsel's strategic decision is dispositive. Nevertheless, as the concurring judge in *Coots* explained, "a defendant's decision not to seek an instruction on a lesser-included offense may inform the calculation whether notice of plain error is necessary to correct manifest injustice." *Id*. We note too that *Wine* is distinguishable from the present case because the context there was different. Specifically, the defendant in *Wine* argued that the trial court had erred in

such an instruction and expressed no interest in one even after the jury questioned whether it could "go for a lesser charge[.]" (Tr. at 198). Defense counsel may have declined to seek additional instructions because his theory of the case was that Pullen did not commit a theft at all, taking Hopkins' keys only to prevent her from driving drunk. (*Id*. at 171-172). For the foregoing reasons, we find no plain-error in the trial court's failure to instruct the jury on theft or robbery by use of force.

{¶ 25} Finally, Pullen's second assignment of error makes a passing reference to his failure to be advised of the jury's request to "go for a lesser charge" or of his attorney's agreement that no additional charge should be given. The record reflects that the trial court discussed the jury's question with both parties' counsel in chambers. (*Id*. at 198). The transcript does not mention Pullen being present. But even if he was not, we see no error. Pullen was not required to be present with the judge and counsel when the jury's question was discussed and resolved. *State v. Rucker*, 2d Dist. Montgomery No. 24340, 2012-Ohio-4860, ¶ 43 ("[W]hen defense counsel is present, a defendant's constitutional rights are not violated when he is absent during the conference regarding the court's response to the jury's question."); *State v. Jordan*, 10th Dist. Franklin No. 14AP-01, 2014-Ohio-3208, ¶ 22, citing *State v. Campbell*, 90 Ohio St.3d 320, 738 N.E.2d 1178 (2000). The second assignment of error is overruled.

{¶ 26} The trial court's judgment is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

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giving a lesser-included-offense instruction. *Wine* did not involve a situation, like the present case, where the issue was whether the trial court had committed plain error in *not giving* a lesser-included-offense instruction. In *Wine*, the Ohio Supreme Court found this difference in context "crucial." *Wine*, 2014-Ohio-3948, at ¶ 26.

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